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No. 86-437

In The

Supreme Court of the United States

October Term, 1986

JUANA DABISH, Executrix of the Estate
of SAM DABISH, JR., a Minor,
Petitioner,

-vs-

CHARTER ARMS CORPORATION,
a foreign corporation,
Respondent.

RESPONSE IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

SHOULD THIS COURT GRANT CERTIORARI UPON PETITIONER'S REQUEST WHERE THE UNDISPUTED AND FULLY DEVELOPED RECORD DEMONSTRATES THERE WAS NO JUROR MISCONDUCT OR NONDISCLOSURE AND THAT REMAND TO THE DISTRICT COURT FOR AN EVIDENTIARY HEARING WOULD BE POINTLESS?

II.

SHOULD THIS COURT GRANT CERTIORARI UPON PETITIONER'S REQUEST WHERE PETITIONER HAS FAILED TO DEMONSTRATE THAT THERE EXISTED AN ISSUE OF FACT OR ANY POSSIBILITY OF CONFUSION AS TO RESPONDENT'S RESPONSIBILITY FOR ITS AGENT'S ALLEGED NEGLIGENCE NECESSITATING THE INSTRUCTION TO WHICH PETITIONER CLAIMS ENTITLEMENT?

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OPINIONS AND ORDERS BELOW

On June 28, 1984, the United States District Court for the Eastern District of Michigan entered a judgment for respondent Charter Arms Corporation on the jury's verdict of no cause for action.

On July 30, 1984, the District Court issued an unpublished memorandum opinion and order denying petitioner's Motion for Judgment Notwithstanding the Verdict or, Alternatively, for New Trial.

On April 30, 1986, the United States Court of Appeals for the Sixth Circuit issued an unpublished decision affirming the judgment entered upon the jury verdict.

Petitioner's Petition for Rehearing was denied June 20, 1986, and the opinion issued as mandate June 30, 1986.

The Text of these opinions is set forth in petitioner's Appendix.

JURISDICTION

Respondent upon information and belief accepts petitioner's statement as to jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

No constitutional provisions are involved.

STATEMENT OF THE CASE

Petitioner Juana Dabish in this "products liability action" unsuccessfully sought to hold the manufacturer of a revolver, Charter Arms Corporation,[1] liable for injuries suffered by a third party, Sam Dabish, Jr., when the weapon was deliberately fired by Gordon Osborne, age 10. The facts and the parties' relative positions during the trial were succinctly summarized by the District Court in its July 30, 1984, opinion:

> "In [1976], Jesus Moreno shared a home with Sam and Juana Dabish and their children. On the evening of December 7, [1976], he returned home carrying a five-shot .38 caliber revolver manufactured by defendant Charter Arms Corporation (Charter Arms). Mr. Moreno did not have a permit for the revolver; it was owned by his

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[1] Charter Arms Corporation has no affiliates or subsidiaries.

employer, Frank Kuraikuz. Mr. Moreno placed the weapon on the kitchen table and retired. He did not unload the revolver or take any other steps to make it inoperable.

"On the morning of December 8, [1976], Gordon Osborne, age 10, arrived at the Dabish home for the purpose of obtaining a ride to school with Sam Dabish, Jr. Osborne observed the revolver and, believing it to be a toy, picked it up and pulled the trigger. The bullet from the loaded weapon struck Sam Dabish, Jr., in the neck and severed his spinal cord, rendering him a quadriplegic.

"On May 10, 1982, a products liability action was filed by Juana Dabish, executrix of the estate of Sam Dabish, Jr., against Charter Arms. The complaint alleged counts of negligence and breach of warranty.

"A jury trial was commenced on June 18, 1984. The thrust of plaintiff's case as presented at trial was that, despite defendant's awareness that revolvers couuld fall into the hands of children, it failed to incorporate an external manual safety device on its product. Defendant countered that the revolver actually incorporated four safety devices: a trigger guard, a trigger pull and a cylinder which would not open or close when the hammer was cocked. Further, that the external manual safety device proposed by plaintiff would render the weapon unfit for its intended use: the personal protection of adult consumers and law enforcement personnel."

As noted by the District Court with respect to the viability of plaintiff's legal theory:

> "Additionally, the Court notes that plaintiff's product liability theory, premised on the tremendous danger of firearms and the great likelihood that such a danger will occur, has been rejected by the vast majority of courts that have considered the issue. See, *Mavilia* v. *Stoeger Industries*, 574 F. Supp. 107 (D Mass. 1983), and the cases cited therein."

The District Court, however, had declined to grant respondent's motions for a directed verdict.

On June 28, 1984, the jury rendered a verdict for respondent on a special verdict form on which the jury found no negligence by respondent and, therefore, did not reach the issues of proximate cause and damages.

Petitioner's primary contention on appeal to the Court of Appeals for the Sixth Circuit was an allegation of possible juror misconduct based upon a juror's revelation after commencement of deliberations that "her husband had a pending case". This occurred in the following context.

After the commencement of jury deliberations, the District Court announced that it had been advised that the jury had reached a verdict in this matter. Counsel for the parties were then advised of the following development:

> "[THE COURT:] At 2:00 p.m. Mrs. Henson, the Bailiff, received a note stating: 'Jury deliberations are over' signed by Patricia A. Brooks. So Mrs. Henson made a call for the parties then.
>
> "At 2:14 p.m. got another note: 'May I see you?' Patricia A. Brooks.
>
> "Mrs. Henson, not knowing what it was all about, saw Mrs. Brooks who is the foreperson of the jury.

> "Now Mrs. Henson, would you state for the record what Mrs. Brooks said to you? Mrs. Brooks should have given you a note, but she didn't.
>
> "MRS. HENSON: Mrs. Brooks indicated that after the jury deliberations were over with and after they had filed all the information necessary, one of the other jurors mentioned that her husband has a pending case that was coming up July 9. She said she didn't state what court, what type of case. I have no idea what exactly is involved and neither does she and that is it."

After expressing uncertainty as to what should be done, petitioner's counsel consulted with his client and returned to eventually request a mistrial after further discussion with the court. The court denied the request and, with respect to respondent's counsel's indication that he had been going to ask the court to inquire of the juror, the court responded "[n]o. I see no reason to do that. There is nothing that has been indicated to the court on the recitation made that the court feels would dictate the necessity of any inquiry."

In fact, the record has revealed that the indication that a juror's spouse had a pending lawsuit would not have been responsive to any question asked of any juror or prospective juror on *voir dire*. As summarized by the Court of Appeals:

> "During the voir dire examination of the prospective Jurors Mr. Meklin [sic], the lawyer representing plaintiff Dabish, asked the panel these questions and received these answers:
>
> "'Has any member of the jury or member of your immediate family ever been involved in

accident investigation, accident reconstruction or claims work?

"'JUROR NUMBER 3: Do you mean for like car accidents?

"'MR. MEKLIR: Yes, they work in the capacity where somebody has a claim for injury or property loss.

"'JUROR NUMBER 3: My husband had a lawsuit for a car accident. Is that what you meant?

"'MR. MEKLIR: No. My question was: Has anybody ever worked where they would have to evaluate claims either for injury or property damage?

"'JUROR NUMBER 3: No.

"'MR. MEKLIR: Has anybody on the jury ever been involved in any kind of accident where they were injured?

"'JUROR NUMBER 7: Car accident.

"'MR. MEKLIR: When did that occur?

"'JUROR NUMBER 7: A few summers ago.

"'MR. MEKLIR: What type of injury did you have?

"'JUROR NUMBER 7: There was just minor injuries.

"'MR. MEKLIR: Was there any lawsuit brought?

"'JUROR NUMBER 7: No.

"'JUROR NUMBER 1: I just received an out-of-court settlement because I was bit by a junkyard dog.

"'MR. ARNONE: You have another hand.

"'JUROR NUMBER 9: Any type of accident where you were injured?

"'MR. MEKLIR: Yes.

"'JUROR NUMBER 9: About thirty-five years ago, I was shot with a pellet gun, was hit in the eye.

"'MR. MEKLIR: What kind of injuries did you sustain?

"'JUROR NUMBER 9: Lost the eye.

"'MR. MEKLIR: You have only vision in one eye, then?

"'JUROR NUMBER 9: Yes.

"'MR. MEKLIR: That is a serious loss. Would you in any way be affected in terms of feeling sympathy for my client who, by the way, has suffered a tremendous injury, because, just because of your past experience, without regard to the other evidence that may be brought out?

"'JUROR NUMBER 9: I would be objective.'

"Later in the *voir dire* the lawyer for defendant Charter Arms asked the panel '[h]as any member of the jury or prospective juror every had a lawsuit filed against them (sic)?'. There was no response to this question."

Among petitioner's other claims of error in the Sixth Circuit which she now seeks to place before this Court is that regarding the trial court's declining to instruct the jury that the negligence of a corporation's officers is the negligence of the corporation. Petitioner claims that this instruction was necessary to allow the jury to impute to

respondent the alleged negligence of its President, Mr. David Ecker.

David Ecker testified by deposition during petitioner's proofs that he had been the President of Charter Arms, a closely held corporation, since approximately 1977, and Executive Vice President prior to that. He is also a stockholder. Mr. Ecker indicated that the handgun in question had been manufactured in 1971 and was designed and developed for a particular market and particular use, *i.e.*, for off-duty police or for detectives, or for home protection. Mr. Ecker, of course, indicated that the possibility of injury by the weapon falling into the hands of a child was foreseeable. He also indicated that there had not been research regarding "childproofing" the handgun in question. He was not aware of any type of trigger safety at any time prior to 1971 which would prevent a gun from being discharged if someone pulled the trigger; however, the gun was designed to prevent it from being fired accidentally.

During respondent's proofs Mr. Ecker testified that there was a way to "childproof" a revolver but that it would thereby be rendered unfit for its intended use:

> "That's by putting a 50 pound trigger pull on a double action or a single action but then some adults would not be able to use it, so then the gun would not be able to do what it is supposed to do."

On appeal, the Court of Appeals for the Sixth Circuit held that petitioner was not entitled to a new trial on the allegation of juror deception because, quite simply, the record demonstrated there had been no juror deception:

> "Plaintiff Dabish failed to pass the first part of the test [to obtain a new trial based upon juror misconduct as set forth in *McDonough Power*

> *Equipment, Inc.* v *Greenwood*, 464 U.S. 548, 104 S. Ct. 548, 78 L.Ed.2d 663 (1984)]. There has been no showing here that 'a juror failed to answer honestly a material question . . .' *Plaintiff Dabish's real complaint is that the prospective juror failed to volunteer an answer to a question that was never asked.* This is not a basis for declaring a mistrial." (Emphasis added).

The Court of Appeals rejected petitioner's claim of instructional error in its initial opinion and in denying rehearing because, under the proofs of this cause, there was "no likelihood . . . that the jury might conclude the president had been negligent but the corporation itself had not been."

SUMMARY OF ARGUMENT

The Court of Appeals properly declined to remand for an evidentiary hearing upon petitioners' allegations of juror misconduct based upon a juror's revealing that her spouse had a lawsuit. The record as is and without need for supplementation by evidentiary hearing conclusively establishes there was no "failure to answer honestly a material question on *voir dire*" because there was no question posed on *voir dire* regarding lawsuits involving the jurors' spouses.

The Court of Appeals properly found no error in the District Court's declining to instruct the jury that the negligence of a corporation's officer is that of the corporation where such was self-evident in the context of this trial and there was no possibility that the jury could have found the respondent corporation's president negligent while the corporation was not.

ARGUMENT – REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS PROPERLY DECLINED TO REMAND FOR AN EVIDENTIARY HEARING ON THE ISSUE OF JUROR NONDISCLOSURE AS THE RECORD ESTABLISHES THERE WAS NO NONDISCLOSURE OF INFORMATION RESPONSIVE TO ANY QUESTION ON *VOIR DIRE*.

In *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 104 S. Ct. 845, 78 L.Ed.2d 663 (1984), the Supreme Court set forth the test for determining when juror nondisclosure will necessitate a new trial:

> "We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." 104 S. Ct. at 850.

The record here establishes that petitioner *cannot* satisfy the first of these two prongs, regardless of whether an evidentiary hearing were to be conducted. There was no failure to answer honestly a material question on *voir dire* because there was no question posed to the prospective jurors on *voir dire* regarding lawsuits involving their spouses or family. As noted by the Court of Appeals:

> "The jury panel had not been asked any questions on *voir dire* about spousal litigation, as opposed to 'accident investigation, accident reconstruction or claims work', and the juror concerned had seen no reason to mention her husband's lawsuit earlier. That judgment does not seem unreasonable, particularly in view of counsel's express statement to the jury that he

> was not inquiring about Juror Number Three's husband's car accident lawsuit.
>
> * * *
>
> "Plaintiff Dabish's real complaint is that the prospective juror failed to volunteer an answer to a question that was never asked."

Petitioner's reliance on *McDonough* for the proposition that the Circuit Court improperly proceeded to the merits of the issue without first remanding to the District Court for an evidentiary hearing is misplaced. In *McDonough* Justice Rehnquist in a footnote was critical of the Court of Appeals' addressing and resolving the juror misconduct issue where it had not been raised before nor addressed by the District Court at any point, because "[a]ppellate tribunals are poor substitutes for trial courts for developing a record or resolving factual controversies."

McDonough involved the failure of a juror to respond affirmatively to a question on *voir dire* seeking to elicit information about previous injuries to members of the juror's immediate family. It was determined subsequent to trial that the juror in question in fact had a son who had been injured in the explosion of a truck tire. It was because the record did not reveal why the juror failed to respond that remand for an evidentiary hearing was appropriate. Here, there was no failure to respond; there was no question asked.

That an evidentiary hearing is not warranted under such circumstances was recognized in *United States* v. *Kerr*, 778 F.2d 690 (11th Cir. 1985), cited by petitioner. There the jurors were asked during *voir dire* whether they or family members were employed by or worked with federal law enforcement agencies of a fire department. After the verdict it was learned that one juror,

who did not respond to those questions, was married to a former county law enforcement officer. Affirming the District Court's denial of the appellant's motion for an evidentiary hearing to determine whether a new trial was required by *McDonough*, the Court in *Kerr* reasoned:

> "*McDonough* involved an absence of response to a question clearly and directly posed. We have a different case here. The lawyers in this case did not ask a question about the jury venire's relation to former law enforcement officers. While the parties in this or any other case are of course entitled to an impartial jury and to an honest and straightforward response from potential jurors on *voir dire* in order to obtain such a jury, we cannot put upon the jury the duty to respond to questions not posed. Had the lawyers wished to know about relations to former law enforcement officers they should have asked. They did not. We affirm the district court's denial of an evidentiary hearing on this issue." *Id.* at 694.

So too here, had petitioner's counsel wished to know about jurors' spouse's lawsuits, he should have asked. He did not. The Court of Appeals properly declined to impose upon the jurors here "the duty to respond to questions not posed." *Id.*

Petitioner's reliance upon *United States* v. *Perkins*, 748 F.2d 1519 (11th Cir. 1984); *Federal Crop Ins. Corp.* v. *Hester*, 765 F.2d 723 (8th Cir. 1985); and *United States* v. *Howard*, 752 F.2d 220 (6th Cir. 1985), is misplaced as in each of those cases the juror in question erroneously failed to respond affirmatively to questions clearly and directly posed.

Petitioner's one-sentence assertion at the close of her first argument, that the Sixth Circuit "failed to take into

account the possible impropriety which developed when the bailiff and foreperson had a conversation about the unidentified juror's disclosure", is simply irrelevant. The only ground for new trial associated with juror misconduct asserted by petitioner at any stage in this matter is that with regard to nondisclosure during *voir dire*. Petitioner has never claimed she is entitled to a new trial by virtue of communications by a juror after commencement of deliberations. Such is obviously irrelevant to the question of another juror's alleged misconduct during *voir dire*.

II.

THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S DECISION NOT TO INSTRUCT THE JURY THAT THE NEGLIGENCE OF CORPORATE OFFICERS OR AGENTS IS THE NEGLIGENCE OF THE CORPORATION WHERE THIS WAS NOT AT ISSUE IN THE CASE AND THERE WAS NO POSSIBILITY OF JURY CONFUSION.

It is axiomatic that, where the instructions of the court fairly, substantially, and adequately cover the material issues in a cause, the court is not required to give additional requested instructions even though they were a correct statement of the law. *Missouri, K. & T. Ry. Co.* v. *Jackson*, 174 F.2d 297, 301 (10th Cir. 1949). A trial court's refusal to give the jury a party's proferred instruction will not support reversal unless it is shown by the appellant that the refusal was legal error (*i.e.*, that the instruction covers a material issue in the case not otherwise covered by the instructions), *and* that the nonprevailing party's "substantial rights" were prejudiced. Fed.R. Civ.P. 61, see *Farnarjain* v. *American Exports Isbrandtsen Lines, Inc.*, 474 F.2d 361, 364-365 (2d Cir. 1973). In other words, where the instructions as given read as a whole "adequately inform the jury on the

applicable law reflecting and reflected by the various evidentiary claims in the particular case" the refusal to give a supplemental instruction is not reversible error. *Johnston* v. *Narmore*, 1 Mich. App. 160, 164, 134 N.W.2d 837 (1965), *aff'd.*, 378 Mich. 491, 146 N.W.2d 655 (1966).

Even assuming, *arguendo*, that the instruction demanded by plaintiff to the effect that the negligence of corporate officers or agents is the negligence of the corporation, was a correct statement of law, petitioner's "substantial rights" could not have been prejudiced here by virtue of the trial court's declining to give this instruction to the jury. Whether the negligence of corporate officers or agents was the negligence of the corporation was simply not an issue in this case. See *Farnarjain, supra.*

There was in the record of this cause absolutely no factual basis upon which the jury could have concluded that the President of the corporation, David Ecker, was negligent while the corporation was not negligent. Mr. Ecker testified as President of, and on behalf of, the corporation and, as pointed out by petitioner in her brief, admitted on cross-examination that the circumstances surrounding and the injury to petitioner's minor in this cause were foreseeable by the defendant corporation. There was absolutely no distinction in the proofs between the acts or purported negligence of Mr. Ecker and those of the corporation itself.

Not only was there no factual basis in the proofs at trial upon which the jury could have found the corporation non-negligent while at the same time finding Mr. Ecker to be individually negligent, but there was no argument to the jury by counsel for either party that such a distinction should or could be made. There is, accordingly, no question but that the trial court's refusal to instruct the jury that the corporation would be liable

for the negligence of Mr. Ecker was not and could not have been outcome determinative. Regardless of whether the instruction requested by petitioner was a correct statement of law, it was irrelevant to any issue in this cause.

In *Farnarjain* v. *American Exports Isbrandtsen Lines, Inc., supra,* the Court recognized that an instructional error with respect to a matter which was not an issue in the case is not grounds for reversal. In that case the plaintiff, who had slipped and fallen on a ship deck, brought an action predicated on negligence against the vessel owner. On appeal by defendant from a verdict in favor of plaintiff, the Court of Appeals agreed that the trial court had erred in using "substantial factor" language in defining proximate cause. The Court of Appeals, however, concluded that such error did not warrant reversal in that *cause* was not an issue in the case. There was no cause of the accident other than the condition of the deck ever suggested at trial. Under those circumstances, the Court held that no "substantial rights" of the plaintiff were prejudiced by the error in the charge. Here, as in *Farnarjain,* the instructional error asserted had no impact on any issue in the case.

As was held by the Court of Appeals here on rehearing, petitioner's reliance on *Moody* v. *Pulte Homes, Inc.,* 423 Mich. 150, 378 N.W.2d 319 (1985), is misplaced.

The plaintiff in *Moody,* who had been hired by defendant Clyde Cinader to haul dirt at a construction project, was injured while helping a fellow employee, defendant Cinader's son Scott, start a bulldozer. The complaint alleged that defendant Clyde Cinader knew his son was incompetent and was directly negligent both in permitting such an individual to operate heavy equipment and in failing adequately to supervise him. The complaint also alleged that defendant Clyde Cinader

was vicariously liable for his son's negligence under the respondeat superior principle.

The trial court in *Moody* failed adequately to apprise the jury of the plaintiff's theory of the case as required by Michigan law. This, *combined with* serious deficiencies in the substantive charge to the jury, "so unfairly prejudiced [the plaintiff] in a materially substantial way" as to require reversal. 378 N.W.2d at 328.

> "Nothing in the court's abbreviated statement of the plaintiffs' theories of liability against Cinader suggested that it was plaintiff's claim that Cinader was liable because of his failure to supervise the work of his employee-son, or because he placed a dangerous bulldozer on a job site, or because the law imposes vicarious liability upon an employer for the negligent act of his employee committed within the course of employment. Moreover, nothing in the trial court's substantive instructions to the jury concerning the law applicable to this case suggested, even remotely, that the asserted negligence of Scott Cinader was attributable to his father-employer Clyde Cinader, or that recovery could be had against Clyde Cinader for his primary negligence in failing to supervise the job or for negligently placing a dangerous instrumentality on the job site." 378 N.W.2d at 335-36.

The instructions on vicarious liability requested by the plaintiff in *Moody* had a "special significance", the Supreme Court said, because the senior Cinader "was not present at the construction site at the time of the accident and had no direct involvement in the activities which ultimately resulted in the plaintiff's injury." 378 N.W.2d at 335. Furthermore, the Supreme Court noted:

> "Given the fact that most of the evidence in the case bearing on the question of active negligence related to the acts or omissions of Scott Cinader and very little related to the acts or omissions of Clyde Cinader, the jurors could not have been expected to know, without instructions from the court, that Clyde Cinader could be liable under the legal fiction of vicarious liability or directly liable upon proof that he failed to supervise his employees upon the job site and provided a dangerous bulldozer for use in their work." 378 N.W.2d at 336.

Here, on the other hand, there was no possibility of confusion, no possibility that the jury would conclude that Mr. Ecker, who clearly spoke on behalf of the corporation, was negligent while the corporation was not.

As the Court of Appeals concluded:

> "In the case at bar, by way of contrast to [*Moody*], Plaintiff Dabish expressly waived any requirement that the court give the jury the plaintiff's particular theories of the lawsuit. (Joint Appendix, pp. 1002-23). There was no risk, in the case at bar, that the jury might fail to impute any negligence of the defendant's president to the corporation because the president was present at the accident and the corporation was not. And we see no likelihood, in the case at bar, that the jury might conclude that the president had been negligent but the corporation itself had not been.
>
> "The jury was told, in the case at bar, that:
>
> > "'The Defendant had a duty to use reasonable care in designing and/or manufacturing the revolver so as to eliminate all risks of harm

> or injury which were unreasonable and foreseeable.
>
> "'A failure to fulfill that duty is negligence.' (Joint Appendix, p. 1130).

"Under the facts of the case at bar, and in light of the charge that was given, the trial court considered it 'self-evident' that Charter Arms Corporation would be liable for any negligence of its officers or employees in designing or manufacturing the revolver with which Sam Dabish, Jr. was shot. We agree, and we see nothing to the contrary in *Moody* v. *Pulte Homes*."

Thus, petitioner has demonstrated no basis upon which certiorari should be granted.

CONCLUSION

Petitioner's Petition for Writ of Certiorari sets forth (and there exists) no basis for this Court to grant certiorari in this matter, including but not limited to pursuant to this Court's Rule 17.1(b) and/or 17.1(c).

For these reasons, respondent Charter Arms Corporation respectfully prays and asks that petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit be denied.

Respectfully submitted,

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